MOTION FILED
APR 26 1985

No. 84-1545 (3)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

THE MILLER-WOHL COMPANY, INC.,
APPELLANT,

V.

COMMISSIONER OF LABOR AND INDUSTRY,
STATE OF MONTANA, AND TAMARA L. BULEY,
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF MONTANA

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF FOR ACLU, ACLU OF MONTANA, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF MONTANA, NOW, NOW LEGAL DEFENSE AND EDUCATION FUND, AND WOMEN'S LEGAL DEFENSE FUND, AND BRIEF AMICI CURIAE CONCERNING JURISDICTIONAL STATEMENT

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The American Civil Liberities Union (ACLU) and its Montana affiliate, the League of Women Voters of the United States and its Montana affiliate, the National Organization for Women (NOW), the NOW Legal Defense and Education Fund, and the Women's Legal Defense Fund move this Court for leave to

file the attached amici curiae brief pursuant to Supreme Court Rule 36. Appellees have not granted consent for Amici to file this brief.

Amici are all organizations involved with both the passage and enforcement of the Pregnancy Discrimination Act of 1978, and collectively have considerable expertise on the issue of pregnancy-based discrimination as it affects the rights of women workers. They are concerned that the decision below poses enormous harm to enforcement of the PDA, thus undermining the rights of women. They are also concerned that the parties to this action have not addressed a core provision of the PDA--that provision (Section 3) requiring that no person may come into compliance with the PDA by reducing any employee's benefits. Unless the views of the Amici are heard by this Court, it could rule on this case without considering this important remedial

provision of the PDA, and thereby seriously undermine the Act.

For the foregoing reasons, Amici respectfully request leave to file the attached brief urging that this Court grant plenary review of the decision below and note probable jurisdiction of this appeal.

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TABLE OF CONTENTS

	Page
Table of Authorities.....	iii
Interest of Amici Curiae.....	1
I. The Question is Substantial.....	2
II. The Resurrection of the Gilbert Rationale that Pregnancy is a Unique Condition in Order to Preserve Special Pregnancy-Based Statutes Under Title VII Would Seriously Undermine the Congressional Purpose of Eliminating Discrimination Based on Pregnancy.....	12
III. Miller-Wohl Has No Federal Defense to Its Violation of State Law Because Although the MMLA on Its Face Conflicts with The PDA, the PDA Explictly Requires Extension of Benefits to the Formerly Excluded Class Rather than the Removal of Benefits from the Favored Class and Miller-Wohl has Violated the State Statute as so Extended....	23
A. The Montana Maternity Leave Act Conflicts with Title VII, as so Amended.....	24

Page

B. The Pregnancy Discrimination Act Itself Required: (1) Montana to Extend the MMLA in April 1979 to Provide Leave for All Employees and (2) Miller-Wohl to Come into Compliance with the PDA by Providing this Leave to Those Few Employees Who Did Not Already Have It..... 32

Conclusion..... 45

Appendix (Descriptions of Amici Curiae)

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1973)..... 19

Geduldig v. Aiello, 417 U.S. 484 (1974)..... 42

General Electric Company v. Gilbert, 429 U.S. 125 (1976).....passim

Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978)..... 6

Newport News Shipbuilding & Dry Dock Company v. EEOC, 462 U.S. 669, 103 S. Ct. 2622 (1983).....passim

Welsh v. United States, 398 U.S. 333 (1970)..... 39

FEDERAL CASES

California Federal Savings and Loan Association v. Guerra, Nos. 84-5843, 84-5844 (9th Cir. April 16, 1985)..... 10

Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972)..... 39

Miller-Wohl Company v. Commissioner of Labor and Industry, 515 F.Supp. 1264 (D. Mont. 1981), vacated on jurisdictional grounds, 685 F.2d 1088 (9th Cir. 1982)..... 20

Page

STATE CASES

Barone and the United States v. Hackett, 35 EPD para. 34,838 (D.R.I. 1984)..... 34

Dare v. Montana Petroleum Marketing Co., 687 P.2d 1015 (Mont. 1984)..... 44

Miller-Wohl Company v. Commissioner of Labor & Industry, 692 P.2d 1243 (Mont. 1984).....passim

FEDERAL STATUTES AND REGULATIONS

Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978), 42 U.S.C. § 2000e(k).....passim

EEOC Guidelines, 29 C.F.R. § 1604 et seq. (1984).....16, 21-22, 33

Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. Pt. 1604 App. (1979).....27-28, 36

Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000(e) et seq. (1964).....passim

STATE STATUTES AND REGULATIONS

Montana Maternity Leave Act, MONT. CODE ANN. § 49-22-310, 311 (1983).....passim

ALASKA STAT. § 18.80.220 (1981)..... 11

CAL. GOV'T. CODE §§ 12,943, 12,945 (West 1980).....12, 17

Page

CAL. UNEMP. INS. CODE § 2626 (Deering 1971)..... 16

CONN. GEN. STAT. ANN. § 46a-60 (West Supp. 1984)..... 12

HAWAII REV. STAT. § 392-21 (1976)..... 16

HAWAII REV. STAT. § 378-1 (Supp. 1984)..... 11

MD. ANN. CODE Art. 49 B § 17 (Supp. 1984)..... 12

MASS. GEN. LAWS ANN. §§ 149.105D, 151 B.4 (West 1982)..... 12

ME. REV. STAT. ANN. tit. 5, § 4572-A (Supp. 1984-85)..... 12

MINN. STAT. ANN. § 363.01 (West Supp. 1985)..... 12

MONT. CODE ANN. § 2-18-618 (1983)..... 44

MONT. CODE ANN. § 39-51-2302(2)..... 43

N.J. STAT. ANN. § 43:21-29 (West 1962)..... 16

N.J. STAT. ANN. § 43:21-29 (West Supp. 1984)..... 17

N.Y. WORK. COMP. LAW § 205 (McKinney 1965)..... 16

Page

R. I. GEN. LAWS § 28-41-8 (1979)..... 16

LEGISLATIVE MATERIALS

123 CONGRESSIONAL RECORD (1977)...28-29, 37-38

SENATE COMM. ON LABOR & HUMAN RESOURCES, 96TH CONG. 2nd SESS., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT of 1978 (Comm. Print 1979).....passim

Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977)..... 30

INTERIM STUDY BY THE SUBCOMMITTEE ON JUDICIARY, "Equality of the Sexes" (Dec. 1974)..... 41

S. REP. NO. 331, 95th Cong., 1st Sess. (1977).....7, 38

Minutes of the Meeting--Montana State Senate, Feb. 5, 1975..... 43

MISCELLANEOUS

BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS 4 Bulletin 2213 (1984)..... 41

THE BUREAU OF NATIONAL AFFAIRS, PERSONNEL POLICY FORUM, POLICIES ON LEAVE FROM WORK, Table 1 (June 1983)..... 41

Page

BUREAU OF NATIONAL AFFAIRS SURVEY, B.N.A. F.E.P. MANUAL, NO. 80 (April 1967)..... 15
...

NATIONAL CENTER FOR HEALTH STATISTICS, DISABILITY DAYS, UNITED STATES (1980)..... 6

DEPARTMENT OF HEALTH AND HUMAN SERVICES, VITAL AND HEALTH STATISTICS 6, Series 10-No. 143, Pub. No. (PHS) 83-1571 (1983)..... 6

Koontz, Childbirth and Child Rearing Leave: Job Related Benefits, 17 N.Y.L. FORUM 480 (1971)..... 16

W. Williams, Equalities Riddle: Pregnancy & The Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE (1984-85)..... 7

Buley v. Three Sisters, Montana Human Rights Commission, SE 80-1255, Appendix to Complaint, Miller-Wohl Company v. Commissioner of Labor & Industry, 515 F. Supp (D. Mont. 1981)..... 20

MILLER-WOHL COMPANY EMPLOYEE GUIDE, Appendix to Appellant's Brief, Miller-Wohl, 692 P.2d 1243 (Mont. 1983)..... 20-21

INTEREST OF AMICI CURIAE

This brief amici curiae is submitted on behalf of the American Civil Liberties Union; American Civil Liberties Union of Montana; National Organization for Women; NOW Legal Defense and Education Fund; League of Women Voters of the United States; League of Women Voters of Montana; and Women's Legal Defense Fund.[1] Most of these organizations were leaders in the successful effort to amend Title VII of the 1964 Civil Rights Act through the Pregnancy Discrimination Act of 1978 (the PDA), and all of these organizations have represented women with claims of pregnancy-based discrimination. Amici believe that the decision below has the potential for causing great harm to enforcement of the PDA and urge this Court to grant plenary review in

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1 Statements describing each organization appear in the Appendix to this Brief.

order to receive full briefing and argument on the important issues in this case, especially on the PDA's requirement that persons comply with the PDA by extending benefits to the formerly excluded class of employees.

I. THE QUESTION IS SUBSTANTIAL

This case concerns an attempt by the State of Montana to guarantee certain minimum job protections to women workers facing loss of their jobs because of pregnancy. Amici fully support this goal, but believe this Court must take this case for plenary review to assure that this goal is achieved in a way that complies with the Pregnancy Discrimination Act of 1978 (the PDA),[2] amending Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq. The

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2 Pub. L. No. 95-555, 92 Stat. 2076 (1978), 42 U.S.C. § 2000e(k).

PDA prohibits states and employers from classifying on the basis of pregnancy; it also prohibits states and employers from reducing any employee benefits as a way of coming into compliance with the Act. The legally appropriate way for Montana to achieve its goal is therefore to extend to all workers the job protections it grants to pregnant employees. This is the only way to achieve job protection for pregnant workers which does not risk severely undermining the PDA--a statute of enormous importance in eradicating deeply ingrained discrimination against pregnant workers.

The Montana statute at issue in this case[3] is drafted not as an anti-discrimination measure, but as an affirmative grant of special rights to pregnant, female workers. Women workers

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3 Montana Maternity Leave Act, MONT. CODE ANN. § 49-2-310, 311 (1983).

alone are provided with the fringe benefits of an unpaid leave of absence and protection against termination of employment when they are disabled from working due to pregnancy, childbirth, or related medical conditions. The statute does not extend the same fringe benefit rights to workers equally disabled from working due to other medical conditions, for one explicit reason: such disabilities are not tied to pregnancy, childbirth, or related medical conditions.

Thus, on its face, the Montana statute directly conflicts with Title VII's ban on sex-based discrimination, which the PDA defined as including all discrimination based on "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (1982). The PDA further specified the relevant standard to be used in measuring whether such discrimination has occurred:

> [W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purpose,

> including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.... Id. [Emphasis added.]

The Montana statute plainly violates this mandate by treating workers disabled for non-pregnancy-related reasons worse than workers similarly disabled, but for pregnancy-related reasons.

Yet the decision of the Montana Supreme Court, Miller-Wohl Company v. Commissioner of Labor and Industry, 692 P.2d 1243 (Mont. 1984), ignores this patent conflict between the two statutes. The Court ruled instead that no conflict existed because "[t]he policy and purpose of the MMLA is to protect equal job opportunities for women as compared to others by removing a female disability job risk not faced by men and non-pregnant females," id. at 1245-46 [emphasis added], and Title VII has the same purpose.[4] The Court thus assumed that women and men face an equal number of days lost

from work for disabilities which both sexes can incur, but that women face an additional risk due to pregnancy,[5] that must be removed to ensure equality. But this very assumption that pregnancy is sui generis, was the basis for this Court's now-overruled opinion in General Electric Co. v. Gilbert,

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4 692 P.2d at 1245. Similarly, the Court noted that "[a]lthough facially neutral, [Miller-Wohl's] no-leave policy subjected pregnant women to job termination risk on a basis not faced by men and...therefore was sexually discriminatory in violation of Title VII and the Pregnancy Disability [sic] Act." Id. at 1245. [Emphasis added.]

5 This factual premise was unsupported by any evidence. Indeed, available data suggest that days lost from work are approximately the same for both sexes even including pregnancy-related disability. NATIONAL CENTER FOR HEALTH STATISTICS, DISABILITY DAYS, UNITED STATES (1980); DEPARTMENT OF HEALTH AND HUMAN SERVICES, VITAL AND HEALTH STATISTICS 6, Series 10-No. 143, Pub. No. (PHS) 83-1571 (1983). This makes sense when one recalls that males have a shorter average longevity than females, see Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702, 704 (1978), which presumably derives from a greater male risk of disability from such causes as heart attacks and smoking.

429 U.S. 125 (1976),6 and was an assumption that Congress decisively rejected in enacting the PDA: "[t]he bill rejects the view that employers may treat pregnancy and its incidents as sui generis, without regard to its functional comparability to other conditions."7 The PDA is thus premised on the comparability of pregnancy-related disability with other disabilities for

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6 See W. Williams, Equalities Riddle: Pregnancy & the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE ___ (1984-85)[hereinafter cited as Williams] (forthcoming in May 1985; manuscript currently available from New York University Review of Law & Socal Change), for an insightful analysis of this reasoning. Professor Williams contends that the Gilbert holding that pregnancy is an "additional risk, unique to women," Gilbert, 429 U.S. at 139, means that the Court viewed pregnancy "...as an 'extra,' an add-on to the basic male model for humanity." Id.

7 See S. REP. NO. 331, 95th Cong., 1st Sess. 4 (1977), reprinted in SENATE COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, 41 (Comm. Print 1979) [hereinafter cited as LEGISLATIVE HISTORY].

employment purposes, as this Court subsequently recognized in Newport News Shipbuilding & Dry Dock Company v. EEOC, 462 U.S. 669, 103 S. Ct. 2622 (1983). Accordingly, the Montana Court's contrary view must be overturned.

Because the Montana Supreme Court found no conflict between the MMLA and Title VII, it of course had no jurisdiction to order extension of the special pregnancy-based fringe benefits to other disabled workers. But in an apparently tacit admission that this Court might find such a conflict, ("extension of such MMLA benefits to all workers would end any argument that the MMLA is indeed sex based discrimination in violation of Title VII," 692 P.2d at 1255), it considered extension as a remedy. Id. at 1254-55. Specifically, the court found that it had the power "to save the legality of questioned legislative enactments by the doctrine of extension, extending the same

benefits to those who would otherwise be discriminated against," and that "[t]his case presents a proper one for judicial extension." Id. at 1244. Moreover, the court noted that strong state policy reasons favored extension. With no state-federal conflict theoretically in sight, however, the proposed extension could only be deferred to the legislature. Although the Montana court failed to order extension because of its erroneous view that there was no conflict between the PDA and the MMLA, its back-up ruling on extension correctly anticipated a second PDA provision--that provision requiring persons not in compliance with the PDA on its date of enactment to come into compliance by raising the benefits of the discriminated-against class, rather than eliminating benefits for the favored class. Section 3 of the Pregnancy Discrimination Act.

As we show in detail below, if allowed

to stand uncorrected, the Montana Supreme Court decision poses enormous risks to the requirements and policies of the PDA.[8] By resurrecting the Gilbert rationale, it opens the door to a renewal of the formerly pervasive and widespread discrimination against pregnant workers, based on the view that pregnancy sets women apart. If a pregnancy-based classification is not sex-based for Title VII purposes, then states may once again enact state laws explicitly harming pregnant workers, and private employers may take action to the same effect. Moreover, the no-conflict ruling also led the Montana court to fail to implement a second important policy requirement of the PDA--that compliance with

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8 See also the recent decision of the Ninth Circuit in California Federal Savings and Loan Ass'n v. Guerra, Nos. 84-5843, 84-5844 slip ops. (9th Cir., April 16, 1985) similarly refusing to recognize the patent conflict between California's special leave for pregnant workers and the PDA.

the PDA requires upward adjustment of benefits so that all workers are covered at the higher level.

The decision also merits plenary review because it specifically permits discrimination against the non-pregnant, in flagrant disregard for the teachings of this Court in Newport News. Finally, this Court's guidance to the states in legislating concerning pregnancy-related matters in employment is sorely needed. The majority of states have adopted neutral anti-discrimination measures or have brought pregnant workers on equal terms into affirmative measures to protect all disabled workers as the best way to resolve these problems. However, at least three states in addition to Montana have opted for statutes granting special rights to pregnant

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9 Compare ALASKA STAT. § 18.80.220 (1981)(unlawful to discriminate on basis of pregnancy); HAWAII REV. STAT. § 378-1 (Supp.

(Footnote continued)

workers.[9] If these latter states are not stopped from legislating on the basis of pregnancy, the encouraging trend to equal treatment of all workers without regard to pregnancy may be ended, despite the explicit command of the PDA.

II. THE RESURRECTION OF THE GILBERT REATIONALE THAT PREGNANCY IS A UNIQUE CONDITION IN ORDER TO PRESERVE SPECIAL PREGNANCY-BASED STATUTES UNDER TITLE VII WOULD SERIOUSLY UNDERMINE THE CONGRESSIONAL PURPOSE OF ELIMINATING DISCRIMINATION BASED ON PREGNANCY.

9(continued)
1984)(same); ME. REV. STAT. ANN. tit. 5, § 45/2-A (Supp. 1984-85); MD. ANN. CODE Art. 49B § 17 (Supp. 1984)(pregnancy related disabilities are temporary disabilities for all job-related purposes); MINN. STAT. ANN. § 363.01 (West. Supp. 1985)(definition of "sex" in discrimination statute includes pregnancy-related conditions); with CAL. GOV'T. CODE § 12,945 (West 1980) right to four months unpaid maternity leave); CONN. GEN. STAT. ANN. § 46a-60 (West Supp. 1984) (right to reasonable maternity leave); MASS. GEN. LAWS ANN. §§ 149.105 D, 151 B.4 (West 1982)(employer shall give employee who has completed probationary term eight weeks maternity leave; unlawful discrimination to fail to comply with requirement).

The view of pregnancy as a unique condition justifying unique treatment by employers caused widespread and serious harm to women workers, and was the evil Congress sought to overturn in enacting the PDA. If that view is resurrected through a summary affirmance of the Montana Supreme Court decision in this case, the PDA will be effectively nullified.

Congress passed the PDA because it was aware of the pattern of discrimination faced by pregnant women workers. Professor Williams describes the pervasively harmful pregnancy-based employer policies prior to the PDA:

> By 1960, the dawn of the decade that would usner in Title VII, many employers simply fired women who became pregnant. Others provided unpaid maternity leaves of absence, frequently accompanied by loss of seniority and accrued benefits. Few provided job security, much less allowed paid sick leave and vacation time to be used for maternity leave. Payment of disability benefits for childbirth were at best restricted and employer sponsored

> medical insurance provided, at most, limited coverage of pregnancy-related medical treatment and hospitalization.
>
> Pervasively, pregnancy was treated less favorably than other physical conditions that affected workplace performance. The pattern of rules telegraphed the underlying assumption: a women's pregnancy signaled her disengagement from the workplace. Implicit was not only a factual but a normative judgment: When wage-earning women become pregnant, they did and should go home. Williams, supra note 6, at ___.

Legislating on the basis of pregnancy--as Montana has done--might appear superficially to be beneficial to women, but in fact it has many harmful effects. First, laws granting pregnant workers special rights create an incentive to discriminate because they impose upon the employer extra costs and obligations to pregnant employees. At least some employers respond to such incentives by not hiring women.[10] Thus, the

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10 A 1967 survey of seventy-eight companies showed that state protective legislation was the cited explanation in 18% of the instances in which women were rejected for

(Footnote continued)

law intended to expand women's opportunities actually limits them. Even if an employer does not discriminate in hiring and grants special rights to pregnant women, the pregnant worker can become the focus of employee discontent if there is no concomitant policy for other workers. See Miller-Wohl, 692 P.2d at 1255.

A second danger is that the preferential treatment law itself will directly cause the very type of discrimination against pregnant women that the PDA was designed to eliminate. Historically, laws regulating pregnant women workers have limited rather than expanded women's rights. For example, as late as 1970, six states and the territory of Puerto Rico banned the employment of pregnant and post-partum women in a number of industries,

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10(continued)
employment. BUREAU OF NATIONAL AFFAIRS SURVEY, BNA FEP MANUAL, NO. 80 (April 1967).

including manufacturing, food processing, and office work. Koontz, Childbirth and Child Rearing Leave: Job Related Benefits, 17 N.Y.L. FORUM 480, 482-84 (1971). As the EEOC has ruled, laws which

> prohibit or limit the employment of females...for certain periods of time before and after childbirth ...do not take into account the capacities, perferences, and abilities of individual females and, therefore, discriminate on the basis of sex. EEOC Guidelines, 29 C.F.R. § 1604.2(b)(1).

Similarly, of the five states then providing workers with paid temporary disability benefits, only Hawaii did not deny or specially limit benefits for pregnant women.11

In the wake of the PDA, such distinctions largely disappeared as pregnant workers were extended the same benefits

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11 Compare HAWAII REV. STAT. § 392-21 (1976) with CAL. UNEMP. INS. CODE § 2626 (Deering 1971); N.J. STAT. ANN. § 43:21-29 (West 1962); N.Y. WORK. COMP. LAW § 205 (McKinney 1965); R.I. GEN. LAWS § 28-41-8 (1979).

provided other workers and were allowed to work on the same terms as other workers facing impending disability. See e.g., N.J. STAT. ANN. § 43:21-29 (West Supp. 1984). But such laws can easily reappear if the decision below is affirmed. For the assumption that pregnant workers need special treatment inevitably leads to a framework in which special pregnancy provisions explicitly harming pregnant workers are seen as equally justifiable. As an example, California--one of the states providing for a special leave of absence for pregnant workers--has several statutory provisions explicitly harming pregnant women. One of these allows employers of five or more persons to refuse to hire or employ pregnant women because of their pregnancy, CAL. GOV'T. CODE § 12,945.12

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12 This provision should be compared to CAL. GOV'T. CODE § 12,943, which prohibits school districts, but not other employers, from
(Footnote continued)

Like California, Montana's statute has a provision which may prove disadvantageous to pregnant workers: an employer may force an employee to take a "reasonable" maternity leave.[13] Given the history of forced leave

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12(continued)
refusing to hire or employ because of pregnancy. Another provision first prohibits employers from refusing to select a pregnant employee for a training program because of her pregnancy, and then allows employers to do so if the employee will not finish the training program at least three months prior to having her baby, whether or not other employees with upcoming disabilities are similarly barred from training programs. CAL. GOV'T. CODE § 12,945(a). Yet another provision allows an employer to provide only six weeks paid leave for normal pregnancy, even if that employer provides longer paid disability leave for all other conditions. CAL. GOV'T. CODE § 12,945(b)(1). In the same vein, all employers are specifically exempted from providing health insurance benefits for pregnancy-related conditions, even if such employers provide benefits for all other medical conditions. Id.

13 MONT. CODE ANN. § 49-2-310(4) provides that it is unlawful for an employer to "require that an employee take a mandatory maternity leave for an unreasonable length of time." Presumably, an employer can require leave for a "reasonable" length of time.

considered reasonable by employers, see, e.g. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1973), this provision has dangerous implications. Yet viewing pregnancy as unique rather than comparable to other medical conditions that may affect workers inevitably has this double-edged effect.

The third danger posed by such laws to the Congressional policy of the comparability of pregnancy and non-pregnancy related disability is that they perpetuate the belief that pregnancy is "a unique burden" of women employees, and that pregnant workers are more expensive, less reliable, more often disabled, and therefore less desirable employees than other workers. If a state may reasonably cite such a burden as the basis for a law, why may not an employer reasonably consider such a burden in selecting its employees?

The final way in which special

preference laws are harmful is that they discourage the rooting out and elimination of discrimination. This is amply illustrated by the case at hand. The Human Rights Division investigator charged with examining state antidiscrimination claims recommended that Ms. Buley pursue an MMLA claim rather than a discrimination claim. Buley v. Three Sisters, Montana Human Rights Commission, SE80-1255, Appendix to Complaint, Miller-Wohl Company v. Commissioner of Labor and Industry, 515 F. Supp. 1264 (D. Mont. 1981). Because the MMLA is not an anti-discrimination measure, the MMLA investigator did not consider any of the evidence suggesting that Miller-Wohl might have acted discriminatorily. For example, although much of Miller-Wohl's Employees Guide[14] contains language

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14 THE MILLER-WOHL COMPANY EMPLOYEES GUIDE, Appendix to Appellant's Brief at 57-71, Miller-Wohl, 692 P.2d 1243 [hereinafter

(Footnote continued)

suggesting prima facie violations of the PDA, none of it was analyzed as evidence of discrimination.[15] Thus, the mere existence

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14(continued)
cited as GUIDE].

15 For example, the booklet has separate sections for Sick Leave, Leaves of Absence for Protracted Illness, and Maternity; the Sick and Illness Sections provide for five days of paid sick leave and up to six months of unpaid leave for workers with one year of seniority, while the Maternity Section makes no reference to paid leave or to six months protracted leave, suggesting that neither the paid leave nor the automatic entitlement to up to six months of unpaid leave was available to women disabled from working for pregnancy-related reasons. GUIDE, supra note 14, at 63-64.

Similarly, a separate Guide section on Time Off (not limited to employees with one year of seniority) includes the right to have "time off" for illness, and Ms. Buley received two and a half days of unpaid leave within her first week of employment, Miller-Wohl, 692 P.2d at 1245, when both she and her employer thought she had the flu. Not until Miller-Wohl had notice of her pregnancy was she fired. See 29 C.F.R. § 1604.10(a)(policy of excluding employees from employment because of pregnancy prima facie violation of Title VII). Yet no evidence was ever collected comparing days of leave granted for employees of under one year, by sex and by reason of disability, either for this Miller-Wohl store, or for

(Footnote continued)

of a statute granting special rights to pregnant women deflects attention from the issue of whether pregnant women are in fact receiving worse treatment than other workers,[16] and suggests to employers and

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15(continued)
its 289 other stores--evidence needed for a disparate treatment theory of discrimination.

16 Neither the disparate treatment Title VII theory, see supra note 15, nor the alternative, disparate impact theory was ever explored in this case. See EEOC Guidelines on Pregnancy, 29 C.F.R. § 1604.10(c): "Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity." [Emphasis added.] This argument is not to be confused with an assumption of disparate impact arising from the mere fact of pregnancy, a theory used by the Montana Court. See supra note 5 and accompanying text. Rather, impact must be proved by examining the actual statistics at Miller-Wohl's stores. If impact could merely be assumed, as many groups have argued in attempting to save the MMLA as a justified one-sex law needed to rectify automatic disparate impact, there would be no need for the conditional language of 29 C.F.R. § 1604.10(c), since any no-leave

(Footnote continued)

other workers that such women are instead getting better treatment, thereby engendering possible incentives to discriminate to an even greater degree against women who might become pregnant, and giving co-workers cause for resentment at the "special deal" women are theoretically getting.

III. MILLER-WOHL HAS NO FEDERAL DEFENSE TO ITS VIOLATION OF STATE LAW BECAUSE ALTHOUGH THE MMLA ON ITS FACE CONFLICTS WITH THE PDA, THE PDA EXPLICTLY REQUIRES THE EXTENSION OF BENEFITS TO THE FORMERLY EXCLUDED CLASS RATHER THAN THE REMOVAL OF BENEFITS FROM THE FAVORED CLASS, AND MILLER-WOHL HAS VIOLATED THE STATE STATUTE AS SO EXTENDED.

There is no dispute in this case that Miller-Wohl violated the express terms of the MMLA. Instead, Miller-Wohl asserts, as an affirmative defense, that the MMLA

16(continued)
policy would automatically be invalid.

violates Title VII by providing for leave to only one class--pregnant workers--in violation of Title VII, and so must be invalidated. If the MMLA is invalid, Miller-Wohl need not comply with it.

This argument, however, flatly ignores Section 3 of the PDA, which provides that persons may not come into compliance with the PDA by reducing benefits to the favored class--in this case, pregnant employees. The result Miller-Wohl urges here would accomplish precisely what Section 3 forbids: it would allow Miller-Wohl to have come into compliance with the PDA by reducing benefits to the favored class--in this case, pregnant employees. Since this reduction itself would violate the PDA, Miller-Wohl has no defense to its MMLA violation and Ms. Buley is entitled to her back pay and penalty. We show here, first, that the MMLA does conflict with the PDA, and second, that both Miller-Wohl and the State of Montana were

required to come into compliance with the PDA by extending unpaid disability leave to all workers not yet receiving it. Thus, Miller-Wohl has no federal defense to its violation of the MMLA as so extended.

A. The Montana Maternity Leave Act Conflicts With Title VII, As Amended By The Pregnancy Discrimination Act.

The plain language and legislative history of the PDA, and this Court's holding in Newport News, compel the conclusion that the Montana Maternity Leave Act as written conflicts with Title VII. The MMLA provides in pertinent part:

> It shall be unlawful for an employer or his agent to:
>
> 1) terminate a woman's employment because of her pregnancy;
>
> 2) refuse to grant to the employee a reasonable leave of absence for such pregnancy.....17

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17 MONT. CODE ANN. § 49-2-310(1)-(2).

These provisions conflict with both clauses of the PDA:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy...shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work....

Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k)(1982) (Emphasis added). First, the MMLA's protection against termination from employment and its requirement of an unpaid leave of absence are provided only to pregnant women because of their pregnancy; therefore, under the first clause of the PDA, these fringe benefits are denied to the non-pregnant "because of [their]...sex," in violation of section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) (1982). Second, the MMLA's requirement that employers provide unpaid disability leave only for pregnant

employees violates the second clause's mandate of equal treatment for all employees "similar in their...inability to work." 42 U.S.C. § 2000e(k). The MMLA thus violates the PDA by placing nonpregnant employees in an inferior position to pregnant workers, on the basis of their sex.18

This interpretation is supported by the EEOC guidelines, which require equal treatment even in the relatively rare situation where--as here--pregnant workers receive superior treatment to that of other workers. Thus, the EEOC requires that if pregnancy-related benefits are provided to

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18 Cf. Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. Pt. 1604 App., Question 5 (employer required to treat disabled pregnant employees in same manner as others, e.g., by providing leaves without pay if others receive them); Question 19 (for purposes of disability insurance, employers must extend to employees temporarily disabled by pregnancy same paid disability benefits received by employees affected by other temporary disabilities, even if state law allows smaller benefits for pregnant workers).

pregnant women after their employment has ended (Question 29, 29 C.F.R. Pt. 1604 App.), or if pregnant employees, unlike other employees, do not have to prove total disability as a prerequisite for payment of extended benefits (Question 30, 29 C.F.R. Pt. 1604 App.), such superior benefits have to be extended to other workers.

The legislative history of the PDA also demonstates that Congress intended to guarantee equality of benefits, not a minimum or special benefit for pregnant workers. The PDA's sponsors repeatedly stated that equality was the purpose of amending Title VII. See, e.g., statement of Senator Williams ("[t]he key to compliance in every case (would) be equality of treatment)."[19] (Emphasis added.) Senator Brooke specifically rejected the notion that

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19 123 CONG. REC. 29,385 (1977), reprinted in LEGISLATIVE HISTORY, supra note 7, at 62.

the PDA would affirmatively grant pregnant workers entitlement to special benefits:

> S. 995 in no way provides special disability benefits for working women. They have not demanded, nor asked, for such benefits. They have asked only to be...accorded the same employment rights as men.20

Thus, as the legislative history abundantly shows, the legislators intended for the PDA to ensure that pregnant workers were treated equally with other workers. Nowhere in the legislative history is there evidence of an intent to give preferential treatment to pregnant workers, as does the MMLA.

Moreover, some groups opposed the PDA precisely because it gave pregnant workers equal and not superior rights. For example,

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20 Id. at 29,664, reprinted in LEGISLATIVE HISTORY, supra note 7, at 135. Accord, remarks of Senator Culver, id. at 29,663, reprinted in LEGISLATIVE HISTORY, supra note 7, at 133. See also id., reprinted in LEGISLATIVE HISTORY, supra note 7, at 133 (remarks of Sen. Mathias)(bill does not require employers to do more for pregnant workers than for any other employees).

the American Retail Federation testified before the Senate Subcommittee on Human Resources that by prohibiting distinctions based on childbirth and pregnancy, "the bill could be read as prohibiting employment practices which provide pregnant women or new mothers with benefits not available to other employees."[21] Similarly, the National Association of Manufacturers unsuccessfully urged Congress to amend the PDA so as to require all employers to provide special disability coverage to pregnant workers--the precise result required by the MMLA--instead of only requiring employers with existing plans to upgrade their coverage to include pregnant workers.[22] Yet Congress passed the

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21 Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 490 (1977)(statement of the American Retail Federation).

22 Id. at 86-87 (statement of Francis Coleman from National Association of

(Footnote continued)

PDA without amendments to respond to these criticisms.

Finally, in Newport News this Court recognized that classifications based on pregnancy are equivalent to sex-based discrimination and that Congress has "unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the Gilbert decision." Newport News, 103 S. Ct. at 2628. The Court also rejected the employer argument in Newport News that male workers could not possibly be protected against sex-based discrimination (arising from the less comprehensive health insurance benefits provided their spouses than the spouses of female workers) because congressional debate had focussed on women workers, not the spouses of male workers.

> This does not create a "negative inference" limiting the scope of the Act to the specific problem that

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22(continued)
Manufacturers).

> motivated its enactment.... Proponents of the legislation stressed throughout the debates that Congress had always intended to protect all individuals from sex discrimination in employment--including but not limited to pregnant women workers.

Id. at 2629-30 (emphasis in original) (citations and footnote omitted). Newport News thus makes clear that any discrimination based on pregnancy is illegal sex-based discrimination, whether directed against pregnant employees (the "normal" situation that Congress primarily focused on), or against the non-pregnant employee (the situation here). The Montana Court's rejection of that simple command, and its tortured attempt to avoid the plain conflict between the MMLA and the PDA through resurrection of the Gilbert pregnancy-is-sui generis rationale, must therefore be overturned.

B. The Pregnancy Discrimination Act Itself Required: (1) Montana To Extend The MMLA In April 1979 To Provide Leave For All Employees And (2) Miller-Wohl To

Come Into Compliance With The PDA By Providing This Leave To Those Few Employees Who Did Not Already Have It.

Section 3 of the PDA expressly provides that:

> Until the expiration of a period of one year from the date of enactment of this Act...no person who, on the date of enactment of this Act is providing either by direct payment or by making contributions to a fringe benefit fund or insurance program, benefits in violation with this Act shall, in order to come into compliance with this Act, reduce the benefits or the compensation provided any employee on the date of enactment of this Act, either directly or by failing to provide sufficient contributions to a fringe benefit fund or insurance program.... [Emphasis added.]

Pub. L. No. 95-555, § 3, 92 Stat. 2076, 2077 (1978). See also EEOC Guidelines, 29 C.F.R. § 1604.10(d)(1). Montana is a "person" covered by this provision,[23] and must come into compliance with the PDA by extending benefits to the formerly excluded class,

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23 See Section 701(a) of Title VII, 42 U.S.C. § 2000e(a) (the term "person" includes governments).

thus granting to all workers the unpaid disability leave it guarantees to pregnant women.[24] The principle does not change because here it is the pregnant, rather than the non-pregnant, who receive superior treatment. See Newport News, 103 S. Ct. 2622.

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24 Indeed, the United States Attorney General has successfully sued the State of Rhode Island for a similar failure to come into compliance with the PDA. Barone and the United States v. Hackett, 35 EPD para. 34,838 (D.R.I. 1984). Barone involved Rhode Island's statutory temporary disability plan, which gave pregnant workers lower paid benefits than all other workers. The case was brought because Rhode Island had failed to extend the higher benefits to pregnant women until more than two years after enactment of the PDA. Rhode Island was sued as a person in that action under the Attorney General's Section 707 pattern and practice authority ("Whenever the Attorney General has reasonable cause to believe that any person...is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern and practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action...."), 42 U.S.C. § 2000e-6(a), and Montana could be subject to suit under the same authority. [Emphasis added.]

Under Section 2 of the PDA, Montana's obligation to extend the MMLA arose on April 29, 1979, since the effective date for fringe benefit programs was set at 180 days after the enactment of the Act on October 31, 1978. Furthermore, Montana was required to continue benefits at the higher sex-neutral level until October 1, 1979, one year after the PDA's date of enactment. Since the cause of action in this case arose in August 1979, Miller-Wohl, 692 P.2d at 1245, the Montana Supreme Court should have ruled that, by operation of the PDA, the MMLA had been extended to cover all employees and that Ms. Buley's MMLA cause of action was valid as brought under the extended statute. Thus, Miller-Wohl is liable for its violation of state law, since the PDA requires extension not invalidation of the Montana statute.

In effect, Miller-Wohl is using its invalidation argument as a way of allowing

it to have complied with the PDA by reducing the benefits provided to its workers--i.e., by eliminating the special leave for women workers. Prior to enactment of the PDA, Miller-Wohl had no federally-based objection to compliance with the MMLA since under this Court's decision in Gilbert, the MMLA did not violate Title VII. Miller-Wohl was thus validly required to provide the MMLA benefits to pregnant workers "on the date of enactment" of the PDA. See Section 3, quoted supra. Given that fact, the company was required to come into compliance with the PDA by extending the leave it was required to provide to pregnant workers to all other temporarily disabled workers; and since the company already had a generous disability leave policy for most workers (those with one year's seniority), it effectively would have come into compliance by extending this pre-existing policy to that small group of employees (those with

less than one year of seniority) who did not already receive it. See 29 C.F.R. Pt. 1604 App. (Question 32).

The Congressional intent behind Section 3 of the PDA was to provide a transitional period during which employers would be required to provide men and women the same higher level of benefits; this in turn would enable employers to assess the actual impact of the legislation.[25] Congress expected that experience with the expanded programs would convince employers that the addition of pregnancy as a covered disability would not disrupt their benefit programs to such an extent that reduction in benefits after the experimental period would be

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25 See remarks of Senator Williams ("these time periods [would] provide all affected parties with an opportunity to gain experience with the actual impact of the legislation."), 123 CONG. REC. 29,386 (1977), reprinted in LEGISLATIVE HISTORY, supra note 7, at 63.

26 "These periods were prescribed on the
(Footnote continued)

necessary.[26] Congress' strong policy favoring raising benefits to the level received by the previously benefitted class is further revealed in the Senate Report, which cautioned that the time limits in Section 3 should not be construed as "permission for employers who do not comply immediately to reduce benefits once the time limits have run."[27]

Thus, Montana failed to extend the MMLA and bring it into compliance with the PDA's mandate of equality without reduction of benefits. As a matter of law, the MMLA should have been extended, and as extended,

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26(continued)
assumption that, after employers have come into compliance and been in compliance for some time, it is very unlikely that changes in fringe benefit packages would be made because of the need to provide equal benefits for pregnant women." Id. at 29,386, reprinted in LEGISLATIVE HISTORY, supra note 7, at 63.

27 S. REP. NO. 331, 95th Cong., 1st Sess. 8 (1978).

would provide the basis for Miller-Wohl's state law liability. Similarly, Miller-Wohl was under a separate obligation to come into compliance with the PDA by extending benefits to the non-pregnant, whether or not Montana had formally acted to extend the statute.

Finally, while extension of benefits was mandated by Congress in passing the PDA, extension also accords with both Montana law and the state legislature's intent in passing the MMLA. First, the Montana Supreme Court found that extension was an appropriate remedy within its judicial power, relying especially on Welsh v. United States, 398 U.S. 333 (1970) (Justice Harlan's concurring opinion), and Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972). See Miller-Wohl, 692 P.2d at 1254. The court noted approvingly that extension would foster the state's general interests in "promoting the health and

welfare of all its citizens," furthering sexual equality, and eliminating hostility toward pregnant workers from those denied disability leave. The court also concluded that a sex neutral disability leave policy would cause the employer no financial disruption and little administrative expense. Id. at 1255.

Indeed, extension would affect only a relatively small number of non-pregnant employees, since the vast majority of employers do not fire workers for medical disability. Even Miller-Wohl gives most of its own employees (all with at least one year of seniority) six months of unpaid leave for illness. Miller-Wohl, 692 P.2d at 1249. Furthermore, recent statistics indicate that the overwhelming number of employees already receive paid sick leave benefits.[28]

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28 Ninety-three percent (93%) of the firms
(Footnote continued)

In addition to the Montana court's ruling on extension, the available MMLA legislative history supports extension. The MMLA was drafted by the Montana Legislature's Subcommittee on the Judiciary as part of a package assembled in response to a legislative mandate to study and then eliminate discrimination from Montana's

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28(continued)
in a BNA survey provided paid sick leave to office and clerical workers, 91% provided paid sick leave to management workers, and 69% provided paid sick leave to plant/service workers. THE BUREAU OF NATIONAL AFFAIRS, PERSONNEL POLICY FORUM, POLICIES ON LEAVE FROM WORK, Table 1 (June 1983). [Although fewer plant and service workers received paid sick leave benefits, they are more likely to be covered by short-term disability insurance benefits. BUREAU OF LABOR STATISTICS, EMPLOYMENT BENEFITS IN LARGE AND MEDIUM FIRMS 4 BULLETIN 2213 (1983).] Finally, eighty-one percent (81%) of the companies provided this paid leave during the first year of employment. THE BUREAU OF NATIONAL AFFAIRS, PERSONNEL POLICY FORUM, supra at Table 6. Nine out of ten employers had additional unpaid leave programs for all three employee groups, allowing employees to take leave for extended physical disability and other needs. Id. at Table 33.

laws. INTERIM STUDY BY THE SUBCOMMITTEE ON JUDICIARY, "EQUALITY OF THE SEXES" 1 (Dec. 1974). At that time, women were being discriminated against either because of mandatory maternity leave policies or because some employers fired women who became pregnant in lieu of granting them disability leave. Since Geduldig v. Aiello, 417 U.S. 484 (1974), allowed the state to classify on the basis of pregnancy, and since the subcommittee assumed that only women were being denied disability leave, it chose to frame the statute as a guarantee to one sex of what it believed the other sex already had.

The emphasis in committee meetings was on the need for a statute to ensure that pregnancy disability be treated like any other disability. Mr. Barrett, of the Employment Security Division of the Montana Department of Labor and Industry, stressed both the similarity between the MMLA and

disability leave in general, and the fact that the statute was needed to assure that women would receive maternity disability leave.[29] The MMLA, therefore, was intended to protect against employers singling out pregnancy disability for less favorable treatment than any other disability. Extending the MMLA, as required by the PDA, will thus preserve this state policy while imposing very little cost on employers both because the leave is unpaid and because it is already available to most employees.[30]

Extension also accords with other sources of Montana law which demonstrate the

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29 Minutes of the Meeting--Montana State Senate, Feb. 5, 1975, at 3.

30 Extension may even help reduce employers' costs, since Montana pays unemployment benefits to workers who lose their jobs after illness, once they are able to return to work. See MONT. CODE ANN. § 39-51-2302(2). Since employers are taxed for these benefits, requiring them to keep such workers on the payroll will reduce these employer taxes.

state's commitment to protecting the job rights of sick and disabled employees. For example, Montana's public employees are given paid sick leave and may also be granted additional leave-without-pay, without distinctions based on pregnancy. MONT. CODE ANN. § 2-18-618 (1983). The Montana Supreme Court has also ruled that employers have a duty of good faith and fair dealing in their employment relationships, and that this duty may include not firing an employee when absence is due to temporary illness. See Dare v. Montana Petroleum Marketing Co., 687 P.2d 1015 (Mont. 1984)(employee fired when she became too ill to perform employment duties as gas station cashier may have cause of action for wrongful discharge). Thus, both the PDA and Montana law and public policy require extension rather than invalidation of the MMLA, as the appropriate resolution of the PDA-MMLA conflict. Miller-Wohl's attempted

federal defense to its state law violation must therefore fail.

Conclusion

For the reasons set forth above, this case presents important and difficult questions of interpretation of both Section 1 and Section 3 of the Pregnancy Discrimination Act of 1978. The Montana Supreme Court decision would have profoundly negative implications for the enforcement of the PDA if summarily affirmed by this Court. This Court should therefore grant note probable jurisdiction of this appeal.

Respectfully submitted,

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** Thanks are extended to Georgetown University Law Center students D. Hollander, L. Isensee, D. Johnson for their help in preparing this brief.

APPENDIX

DESCRIPTIONS OF AMICI CURIAE

The American Civil Liberities Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU has established the Women's Rights Project to help eliminate the pervasive problem of gender-based discrimination. It has participated in the litigation of many cases challenging sexually discriminatory practices, including in particular the major cases involving discrimination against women on the basis of pregnancy. The ACLU of Montana is the Montana affiliate of the ACLU.

The National Organization for Women ("NOW") is a membership organization of approximately 250,000 men and women in about 750 chapters throughout the United States dedicated to assuring equal employment

opportunities for women and bringing women into full participation in American society. NOW is frequently contacted by and asked to assist women who have been subjected to sex discrimination, including discrimination based on pregnancy.

The NOW Legal Defense and Education Fund ("NOW LDEF") was founded in 1970 by leaders of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of the NOW LDEF is the elimination of barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination.

The League of Women Voters of the United States is a national non-partisan

political membership organization with 110,000 members in more than 1,300 state and local Leagues in all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands. Since it was founded in 1920, the national League's purpose has been to promote political responsibility through informed and active participation of citizens in government. From its inception, the national League has worked for equal rights. The national League believes that no person or group should suffer legal, economic or administrative discrimination. To further its commitment to equal access to employment, the national League has participated as an amicus in many of the major cases challenging race and sex discrimination in employment. It has worked for passage of federal legislation that would eliminate discrimination, including the Pregnancy Discrimination Act of 1978, and for the adoption of effective

regulations to implement those laws.

The League of Women Voters of Montana is the Montana affiliate of the national League, and has worked at the state level for the adoption of laws and regulations to provide equal access to employment for women in Montana.

The Women's Legal Defense Fund is a non-profit, tax exempt membership organization founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment through litigation of significant employment discrimination cases, through the operation of an employment discrimination counseling program, and through agency advocacy before the EEOC and other federal agencies charged with enforcement of the equal opportunity laws. It has had particular interest in the

implementation of the Pregnancy Discrimination Act, which it worked to pass in 1978 and whose enforcement it has since monitored through its Pregnancy Rights Monitoring Project.